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NO. 87-1439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORMAN D. REVIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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For the first time at any stage of this protracted litigation, the Government explicitly argues in its Brief in Opposition that an Article I bankruptcy judge having jurisdiction to hear a case under 28 U.S.C. § 157 necessarily possesses a coordinate, seemingly unrestricted power under 28 U.S.C. § 105(a) to order any litigant in an adversary proceeding (and, presumably, any other witness as well) to appear personally before the bank-

ruptcy court, at his own expense, regardless of how far away he is when the order issues and no matter how unanticipated, burdensome, or inconvenient the command may be. The implications of this sweeping, unqualified position are so astounding[1] that the Court should grant certiorari simply to find out if the Government is really serious.

The Court of Appeals' decision, and the Government's arguments in support of it, are based upon the uncritical assumption that a court's jurisdiction to hear a case necessarily and inevitably encompasses the unqualified power to compel the attendance of witnesses at such a hearing. Such a supposition is manifestly insupportable. The Federal Rules of Civil Procedure traditionally have circumscribed the authority even of Article III judges to command a litigant's or witness's physical presence in the courtroom, *GFI Computer Industries, Inc. v. Fry*, 476 F.2d 1, 5 (5 Cir. 1973), a limitation that plainly extends to Article I courts possessing no inherent judicial powers. See, e.g., Bankruptcy Rule 9016 (applying F. R. Civ. P. 45 in bankruptcy proceedings); *In Re Food Supplement Co., Inc.*, 33 B.R. 188, 189 (S.D. Fla. 1983) (attendance of witnesses other than the debtor may be compelled only by subpoena).

If a subpoena is nothing more than "an order to a person to appear as a witness in [a] case," *Holebrook v. Cafiero*, 18 F.R.D. 218, 219 (D. Md. 1955), the Federal Rules and Bankruptcy Rules necessarily must govern the

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1. For example, a litigant or witness vacationing in Afghanistan could be compelled by telegram, with no forewarning from the bankruptcy court, either to return immediately for an impromptu hearing or to risk criminal contempt sanctions for willful disobedience of the order.

issuance of all orders commanding a personal appearance, irrespective of whether the command is denominated a "subpoena" or an "order to show cause." The Rules have the force and effect of a federal statute, *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 13 (1941); *American Universal Insurance Co. v. Pugh*, 821 F.2d 1352, 1354 (9 Cir. 1987), and "[w]here a statute specifically addresses the issue at hand, it is that authority . . . that is controlling. Although [federal courts may be empowered] to fashion extraordinary remedies where the need arises, [that] does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985).

Since a show-cause order directing a personal appearance is functionally equivalent to a subpoena, and since the show-cause orders at issue here complied neither with Federal Rule 45 nor with Bankruptcy Rule 9016, they are void and cannot support the imposition of criminal contempt sanctions. *CF & I Steel Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 713 F.2d 494, 496 (9 Cir. 1983); *United States v. Thompson*, 319 F.2d 665, 667 (2 Cir. 1963); *cf. Jaynes v. Jaynes*, 496 F.2d 9, 10 (2 Cir. 1974) (absence of power to subpoena equivalent to absence of jurisdiction to compel attendance); *United States v. Ryan*, 402 U.S. 530, 533 (1971) (party ordered to comply with subpoena "is free to refuse compliance and . . . may obtain full review of his claim before undertaking any burden of compliance"). Any alternative conclusion would confer upon federal judges unlimited discretion to order litigants to appear in person before the court, regardless of how burdensome, unneces-

sarily expensive, or unreasonable such an order might be, perhaps without any realistic opportunity to secure appellate review of the order in advance of compliance.[2]

The Government's reliance on *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5 (1 Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) is misplaced, for either of two reasons. First, unlike Article III district judges, Article I bankruptcy judges exercise no "inherent powers" over the cases, litigants, and witnesses before them but only such powers as Congress has expressly conferred. See, e.g., *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281, 1284 (9 Cir. 1987); *Federal Deposit Insurance Corp. v. Majestic Energy Corp. (In re Majestic Energy Corp.)*, 835 F.2d 87, 89 (5 Cir. 1988). Nothing in the Bankruptcy Act expressly or by necessary implication confers upon Article I judges the authority to issue show-cause orders or to command the personal attendance of witnesses who are not otherwise subject to subpoena. Even if the district judge possessed that power (and the Fifth Circuit's decision in *GFI Computer Industries* holds otherwise), the bankruptcy judge did not.

Secondly, and most importantly, the non-appearing corporate officers in *Brockton* were not *themselves* sanctioned, and could not have been, because the magistrate

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2. The Government's implication that Revie deliberately "[thwarted] the [bankruptcy] court's attempts to determine the existence of contempt simply by removing himself more than 100 miles from the district and invoking the geographic limits of the court's subpoena power" (Brief in Opposition at 11) is totally unsupported by anything in the evidence. The record conclusively establishes that Revie had gone to Washington, D. C. for perfectly legitimate reasons, well before either of the two show-cause orders had even been issued. He had personally attended all previous hearings, including a "compliance hearing" scheduled by the bankruptcy judge.

never sought to compel their attendance by ordering them to the courtroom. *Brockton* would be in point only if the magistrate had attempted to order that the witnesses personally appear before him and the district court had then sought to adjudge them in criminal contempt of court for alleged willful disobedience of that order. *Brockton* is authority for no more than the proposition that Revie's nonappearance in response to the two show-cause orders warranted the bankruptcy judge referring the matter to the district court for consideration of civil contempt sanctions. It does not support the authority of any non-Article III court, whether magistrate or bankruptcy judge, to compel the attendance in court of litigants who are not otherwise subject to the subpoena power, or to issue orders enforceable through criminal contempt sanctions but not explicitly authorized by Congress.[3]

Presumably to create the strategic misimpression that Revie's alternative question for review presents only concurrent fact-findings by the lower courts, the Government formulates the issue as being whether "the court of appeals erred in sustaining the district court's factual finding that [Revie's] disobedience of the show-cause orders was wilful" (Brief in Opposition at 11). That is simply not the question. The question is not what Revie thought the show-cause orders meant, nor whether he

3. The Government's suggestion that Revie's argument is untimely (Brief in Opposition at 9) is completely baffling. The question of whether the bankruptcy judge's orders were functionally equivalent to subpoenas, and therefore were subject to equivalent constraints, did not even arise until the Fifth Circuit grounded its decision on the "narrow issue" of whether show-cause orders initiated by bankruptcy judges are punishable by criminal contempt sanctions. 834 F.2d at 1206. That issue, as formulated by the Court, was never previously briefed or argued by either side.

possessed the requisite contumacious intent, but rather whether the meaning of a court order, and the nature of the obligation of obedience it imposes, must be extrapolated from judicial remarks dehors the order. Revie was never explicitly ordered to appear *in person* before the bankruptcy court, but because of remarks made on the record by the bankruptcy judge, never shown to have been communicated to Revie by his counsel, the Fifth Circuit thought the orders impliedly commanded a personal appearance, notwithstanding a federal statute authorizing a civil litigant to "appear" either in person or by counsel. 28 U.S.C. § 1654. Simply stated, Revie was sandbagged by after-the-fact judicial interpretations of two equivocal, ambiguous show-cause orders, neither of which on its face imposed a clear, unconditional obligation to appear in person before the bankruptcy court.

Because the phrase "close enough for government work" can have no possible application to criminal contempt proceedings before the courts of the United States, Revie's petition for certiorari should be granted.

Respectfully submitted,

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